IN RE ARBITRATION BETWEEN:

MIDDLE MANAGEMENT ASSOCIATION

and

STATE OF MINNESOTA – DEPARTMENT OF NATURAL RESOURCES

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

May 1, 2007

IN RE ARBITRATION BETWEEN:

Middle Management Association,

and

State of Minnesota - DNR

DECISION AND AWARD OF ARBITRATOR
Joe Marcino grievance matter

APPEARANCES:

FOR THE ASSOCIATION:
Ron Rollins, Krause & Rollins
Joe Marcino, grievant
John Huber
Rick Nelson

FOR THE STATE:
Carolyn Trevis, Acting Assistant State Negotiator
Ling Shen
Ranjit Bhagyam
Edwin Stork
David Wright
Lee Pfannmuller
Colleen Schmitz
Steve Hirsch
Bud Kincaid

PRELIMINARY STATEMENT

The above matter came on for hearing on March 5 & 6, 2007 at the Bureau of Mediation Services, 1380 Energy Lane, St. Paul, Minnesota and March 7, 2007 at the DNR offices at 500 Lafayette Rd. in St. Paul, Minnesota. The parties presented testimony and documentary evidence and submitted post-hearing Briefs dated April 10, 2007 at which time the record was considered closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2005 through June 30, 2007. Article 7 provides for submission of disputes to binding arbitration. The arbitrator was selected from a permanent panel of arbitrators agreed to by the parties. It was stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

The parties stipulated to the issue as follows: Did the Employer discharge the grievant for just cause? If not, what is the appropriate remedy?

PARTIES' POSITIONS

STATE'S POSITION:

The State's position was that there existed ample just cause to terminate the grievant for repeatedly violating State ethics policies as well as State law for his actions in this matter. In support of this position the State made the following contentions:

1. The State asserted that this case is about credibility and honesty. The grievant was a supervisor in the DNR Fish Pathology Lab. He had a great deal of responsibility, not the least of which was to set a proper example for reporting of expenses and time. He also had a great deal of latitude and discretion in his position and is required to be out of the office a great deal of the time. This creates the need to trust him in the reporting of his time and expenses since no one is right there with him watching what he does. In addition, the grievant uses his personal vehicle for trips and gets reimbursed for mileage. Under the labor agreement employees traveling away from the office are under certain circumstances entitled to lodging and meal reimbursement. The grievant paid out of pocket for equipment and office supplies at times and was entitled to reimbursement. Incumbent in all of this however is the underlying notion that the grievant, and indeed all employees entitled to reimbursement for expenses such as these, must be honest about it and report only those expenses that are truly work related and must also report them accurately. The State alleged that the grievant failed in both these respects.

2. The State did not assert that there were problems with the grievant's job performance; indeed the State acknowledged that the grievant's work as a scientist was quite good, even exemplary. The State alleged however that this is not the issue in this matter. The issue is how the grievant reported and accounted for expenses such as mileage, meals, lodging and other expenses for what he alleged were business related trips but which the State alleged were in fact for personal purposes.

3. The State asserted that the grievant essentially defrauded the State by claiming personal expenses for trips to LaCrosse, Wisconsin that were in reality to see his girlfriend who lived in that area, claimed several personal expenses for a trip to Baltimore to attend a conference in 1998, used State vehicles for personal purposes, inflated the actual expenses for mileage and meals, abused time not only for himself but by directing employees under his supervision to perform duties personal to the grievant and by creating a "culture of corruption" within his department.

4. The State argues, as will be discussed below, that the grievant's position requires trust and that this trust was abused and cannot now be placed in the grievant. The State further asserted that the grievant was quite nonchalant in his demeanor throughout the investigation and simply did not think all these transgressions were "any big deal." This lack of contrition demonstrates a startling lack of understanding of the gravamen of the charges and makes it impossible to ever trust him again given the nature of his job.

5. The State provided a litany of expense reports and incidents it asserted were evidence of terrible reporting of expenses at the least and an intent to defraud the State of Minnesota and its taxpayers at worst. In 1999 the State pointed to two separate expense sheets for reimbursement for certain office supplies. See State exhibits 14 (a) and 14 (b). The grievant claimed expenses twice for this and was paid twice for the same expenses. His only explanation for this was that he must not have seen on the second expense sheet that there was a duplicate entry for the printer supplies. The State asserted that this is not credible and that the grievant was attempting to seek reimbursement for the same expense. At the very least it shows a complete lack of attentiveness to the need for accuracy in reporting of expenses – something that the grievant later expected his employees to do yet which he was unwilling to do himself.

6. The State also pointed to yet another expense report in 2003 on which he submitted the same mileage twice for trips taken to the U.S. Fish and Wildlife Service, USFWS, near LaCrosse Wisconsin. He apparently left on a Sunday yet the State pointed to the evidence and testimony from the representative of the USFWS that the grievant could not have entered the lab there on a Sunday. Thus he could not have been working that day. Each of the expense reports contains a statement that the "claim is just and correct and that no part of it has been paid." The grievant violated both of these statements – the claim was not just and correct and it had been paid before. The grievant's only explanation was that it was an error and could not provide any further explanation for why he would submit duplicate expenses for a tip that may not have been reimbursable in the first place.

7. The State pointed to a multitude of trips to the USFWS in LaCrosse that it asserted were suspicious at best. Notable among these was a trip on New Year's Eve, Valentine's Day, Thanksgiving and many more around weekends. The State also argued that immediately after beginning the relationship with the woman in LaCrosse the grievant's frequency of visits there increased dramatically without any corresponding need for them. The State argued that while there was some need to go to the USFWS lab, and acknowledged that he did travel there prior to beginning the relationship with the girlfriend there, there was simply no need to go there as often as he did.

8. The State further asserted that many of the trips were thus "featherbedding" or make-work trips to deliver personally items that could easily have been mailed or sent by courier service. This would have saved huge amounts of time and money for the State. The State argued that the grievant was unable to provide any cogent explanation for why he had to physically go there to deliver these things. Notable among these was a trip to deliver booties to cover people shoes while performing certain procedures or experiments. These could certainly have been sent by courier or simply mailed.

9. The State also argued that there were many instances when the time he left or returned was inaccurate even when he did go to various work related places. The State pointed to the testimony of co-workers and supervised employees who reported that in some instances the grievant did not leave until much later than his time sheet said he did. The State asserted that this was done in order to claim meals. Under the contract at Article 18, section 5, employees are entitled to claim meals if they are meet certain travel criteria as set forth in that section. The grievant would report that he left at 11:00 a.m. to go to an off-site lab or fish hatchery yet the other employees noted that he left at 1:00 p.m. On many of those days the grievant would submit expense reports for a lunch even though he was not contractually entitled to those. The State also pointed to several other instances when the time appeared to have been intentionally misstated where the grievant also claimed meal expenses and should not have.

10. The State asserted that the grievant did not provide any compelling reason for the increase in the number of trips to the USFWS lab and that the increase is suspicious at best. He would also talk openly and freely to his coworkers about going to visit his girlfriend and never really mention a work related reason for going over many of the weekends and was later discovered to have submitted work related expense for these trips.

11. The State asserted too that even the mileage for the many trips to LaCrosse was inconsistent and diverged widely from trip to trip. Again this evidences either intent to claim personal mileage or very poor record keeping by the grievant.

12. The grievant also called upon his co-workers to perform personal errands for him. Mr. Bhagyam testified to a trip he took with the grievant during which they deviated from their trip to the Spire Valley hatchery to go to the grievant's lake cabin to retrieve some fishing gear. He submitted mileage for that trip.

13. Significantly, when the grievant sold his vehicle in the LaCrosse area, he directed Ms. Shen to come get him on State time and at State expense. He admitted to the latter instance and simply called it "stupid" and shrugged it off to investigators, and at the hearing, as if ordering a subordinate to drive at taxpayer expense to LaCrosse Wisconsin from St. Paul Minnesota and back for the sole purpose of picking him up because he had sold his vehicle was somehow OK.

14. The State also audited the grievant's expenses for several years and found that he had submitted personal expenses for a trip to Baltimore. He and several co-workers attended a conference there and were of course required to stay in a hotel. The grievant however brought his daughters with him on the trip and while he apparently did not charge the State for their airfare, he did rent a car and drive them to relatives in Pennsylvania and racked up approximately 1200 miles doing so. To say nothing of the fact that he spent considerable time driving to and from his relatives' home in Pittston PA from Baltimore, as opposed to attending the conference as he was supposed to, he charged the State for some of the gas for these personal trips. Moreover, he got a separate hotel room so he could stay with his daughters on the nights they spent there and again charged the State. Finally, he falsely claimed that he ate a separate meal even though the State had already paid for a banquet meal for him.

15. The State countered the Union's claims on several points as well. It argued that the investigation was thorough and fair. Contrary to the Union's assertion that the investigation was fatally flawed, the State alleged that they did not contact the USFWS because they relied on the grievant's statements that they would not be able to verify the times or dates he was there. Moreover, given the nature of the federal laws pertaining to gaining access to federal employees, the State investigators would likely not have garnered much evidence anyway. They could certainly not have spoke to anyone other than perhaps Mr. Nelson. Finally, there was no showing that talking to the USFWS employees would have led investigators to different factual conclusions or any different outcome for the grievant here. The State would still have come to the same conclusion, i.e. that the grievant overstated the need for the trips there and that most of the trips were personal.

16. The State also noted that Mr. Nelson from USFWS actually verified much of what the State knew anyway and confirmed that the lab is not generally open on weekends and that the federal employees "knock off" early on Fridays anyway. Mr. Nelson was also not able to confirm whether he ever told the grievant to come down there on a Friday although they do prefer to work with DNR later in the week. That of course would include Thursdays yet it was rare that the grievant was ever there on a Thursday. They also confirmed that the grievant did not have access to the lab there on weekends and could not have met with or worked with the employees there. Mr. Nelson also contradicted the grievant's statement regarding whirling disease processes. These do not start on Fridays as the grievant alleged but rather is done during the week.

17. The State further noted that Ms. Schmitz conducted a very thorough and balanced investigation and did give the grievant the opportunity to know prior to the second interview what he was being investigated for. The State alleged that they complied with the provisions of Article 6 section 4 and gave the grievant the principle allegations being investigated prior to the time and place of the investigation.

18. The State argued that the Association is simply incorrect in its assertion that there is double jeopardy a work here. While the grievant's expenses were audited in May of 2005 he was not disciplined at that time based on these findings. Moreover, some of the allegations made in the termination were not known at the time of the audit. For double jeopardy to apply, there must be formal discipline for a stated set for allegations and then an attempt to re-discipline the person for the same set of allegations. That simply did not occur here since there was no formal discipline meted out in 2005. The grievant and his supervisor met and discussed the findings and he was directed and counseled to be more careful about recording mileage and to use Map Quest to verify mileage.

19. As noted above, there were other facts that came to light after the audit that led the supervisors to believe that discipline was warranted. This included the marked increase in trips to LaCrosse; the trips Ms. Shen made to pick the grievant up in the LaCrosse area and the Baltimore trip issues. These facts of course gave the supervisor at the State great pause about the grievant's credibility and, more importantly, gave them the right to look again at the grievant's expenses reporting and this time take action.

20. The essence of the State's case is thus that the grievant engaged in a long series of misconduct with regard to the reporting and claiming of expenses that simply cannot be ignored and should provide the basis for his discharge. The grievant's further lack of understanding of the seriousness of these charges, as evidenced by his cavalier attitude toward them during the investigation and the hearing, are further proof of the need to discharge him from his job. Thus, despite the fact that he is a very competent research scientist, his poor record keeping, apparent intentional misstatements and the creation of the "culture of corruption" as one of his supervisors termed it, makes it impossible to ever fully trust him again.

The State seeks an Award denying the grievance and sustaining the discharge.

ASSOCIATION'S POSITION

The Association took the position that the grievant may have made some errors in reporting but that these were not deliberate attempts to defraud the State and that the discipline should be overturned and the grievant's record expunged. In support of this position the Association made the following contentions:

1. The Association acknowledged some of the errors the grievant made in submissions for reimbursement but argued quite strenuously that even these do not show the intent to defraud the State here. The Association further argued that most the allegations raised by the State were unsubstantiated by the evidence, overblown or simply false.

2. First, the Association argued that the State violated the contract in the investigation when it essentially ambushed the grievant with the allegations without first telling him the nature of them or the time or place they alleged occurred. The State cannot now argue that the grievant should be vilified because he did not know the answers to many of the questions asked of him during the investigation because the investigator did not follow the contract when doing the investigation.

3. The Association pointed out that before ever talking to the grievant, State investigators spent weeks again going over expense reports and documents such that they knew all of the dates and places involved in the investigation but they intentionally did not provide those details to him at the beginning of the first interview. The Association points to CBA at Article 6, section 4 which provides in relevant part that "the supervisor [grievant] shall be advised of the principle allegations being investigated, and if known, the alleged time and place of occurrence prior to questioning." The Association pointed to several prior awards involving this provision that requires that it be adhered to. Here it was not resulting in a fatal flaw in the investigation.

4. The Association also argued that the State cannot rationalize the failure to comply with the CBA simply because they interviewed the grievant a second time. The contract clearly provides for this information to be given to the grievant *before* being questioned. Indeed, the State made much of the fact that the grievant did not know the answers to its questions at the first interview when he was essentially ambushed with the information in clear violation of the contractual provision that protects him from the very thing the investigator did here. The Association cited Arbitrator Cooper in a prior case involving these same parties in which she held that there must be a consequence for the failure to comply with this very provision. Arbitrator Cooper disregarded that part of the investigation that was garnered in violation of the provision at issue here.

5. The Association also argued that the grievant was placed in a double jeopardy situation here and that the discipline cannot be sustained as a result. The State actually audited the grievant's expenses and reports in May of 2005. After an extensive review of his expense reporting and his documentation, his superiors merely counseled him to be more careful and to perhaps use Map Quest when reporting mileage in order to be more accurate. This investigation was formal and covered all the years in question. Despite this the grievant was merely told to "be more careful." Using the same information the State is attempting to discharge the grievant for what they told him was not dischargeable one year before. Even if the strict doctrine of double jeopardy does not apply, the Association argued that the doctrine of laches would, but the result is the same – the State cannot be allowed to impose the supreme industrial penalty now for essentially the very same conduct they also shrugged off as poor record keeping and to simply be more careful about a year before.

6. Moreover, after Mr. Wright told the grievant to be careful *he was*. None of the State's allegations post-date June 2005. The grievant certainly took the admonition to heart and in fact amended his behavior to comply with what the Department and his supervisors wanted him to do.

7. The Association also pointed to the testimony and investigative information from Mr. David Wright, the grievant's immediate supervisor who indicated that he did not see anything wrong with nor particularly suspect in the number of trips to LaCrosse. That of course was a major part of the State's case against the grievant and is severely undercut by the testimony of his direct supervisor.

8. The Association also pointed to what it terms was another fatal flaw in the investigation in that the investigator did not call Mr. Nelson to verify how many times the grievant was at the USFWS. Apparently she did this in order to A) protect the grievant and B) because the grievant had told her in the first interview that he did not think the people at USFWS would have the specific dates he was there anyway. The investigator made one cursory call to Mr. Nelson but found only that he did not have specific dates when the grievant was there. She apparently did not also try to verify that the grievant was there more often in 2003 and 2004 or for what reasons he may have been there.

9. The Association further assailed the credibility of Ms. Shen and Mr. Bhagyam. The Association pointed to the full investigation report State Exhibit 10, and noted that they raised a whole slurry of complaints against the grievant most of which were unfounded. These ranged from harassment to statements regarding their national origin to sabotage of a tissue processor. It was apparent that these people were truly out to get him and that they would fabricate almost anything to do it. The Association argued that their testimony simply cannot be taken at face value based on this.

10. The Association asserted further that it strains credibility that the Department would have tried to "protect" the grievant. The State asserted that had they begun talking to USFWS the grievant's reputation, as a researcher would have been tainted so they attempted to protect him. This from the same people who ultimately fired him seems oddly incongruous at best.

11. Moreover, had the investigator talked in some detail to USFWS she would have discovered that in fact there were reasons for the more frequent visits there and that DNR and USFWS were attempting to work together more loosely on several projects. Simply stated, the discipline might have been different if they had done a proper and thorough investigation. Certainly, one cannot say with certainty that the discipline would have been the same if they had known these crucial facts.

12. The Association next turned to the testimony of the two other lab employees, Ms. Shen and Mr. Bhagyam. The Association painted a picture of the environment in the lab as one somewhere between that which existed on the Bounty and that which existed on the Caine. In the former the mutiny was the result of the captain whereas in the latter it was more the result of the crew. There was a culture where they were tracking the whereabouts of their supervisor rather than doing their jobs and even sinking to the point of snooping on the grievant's computer. While tracking employees' comings and goings is a normal and even expected supervisory function, tracking of the supervisor is not. Again these two were spending considerable time on this rather than focusing on their jobs – a fact seemingly ignored by the State here.

13. The Association pointed out that for several years they have been complaining about the grievant and have gone several times to Mr. Wright complaining that they did all the work and that the grievant did not do much. Mr. Wright to his credit discounted that griping since he was well aware of the work the grievant was doing.

14. The Association pointed to the letter of expectations Ms. Shen and Mr. Bhagyam received and argued that their expense reports were quite lax and that they needed to be more careful about how they reported expenses and time. Mr. Wright verified that this investigation of their reporting was also thorough and he backed up the need for those letters. It was clear that the employees had a vendetta against the grievant and that they were "out to get him" for whatever they could trump up. It was clear that they had a great deal of anger and resentment at having been called on the carpet for their shortcomings in this way even though the department supervisor backed up giving them those letters.

15. The Association argued that much of the evidence on which the State relied was in fact trumped up by these two. As one example, for the April 21, 2004 incident wherein the grievant was alleged to have taken a State van home for personal purposes, the Association argued that the evidence on which this allegation is based was essentially fabricated by Ms. Shen. The Association pointed to the entries made for the trips to Hinckley and noted that Ms. Shen forged Mr. Bhagyam's signature, not the grievant for those reports. They pointed to the misspellings as evidence that she made those entries and then was untruthful about it later. See, Association exhibit 2 at page 4.

16. The Association also pointed to several other inconsistencies in testimony by the two employees and pieces of evidence that simply did not fit with their testimony. Mr. Bhagyam testified that he needed to go to the grievant's desk to answer the phone many times yet he has a 4 line phone on his desk allowing him to answer it there. He further testified that he actually snooped on the grievant's computer and he "accidentally" hit a key and the grievant's personal financial information came up on the screen.

17. Not only was there no evidence that the grievant ever had his personal financial information on that computer, there was absolutely no reason for Mr. Bhagyam to have hit a key on the grievant's computer nor was it anything other than illicit for him to then stay and read what was on it. Somehow the State overlooked the moral and ethical transgressions made by these two in order to get to the grievant. More importantly, their credibility must be discounted severely due to this evidence.

18. Regarding the Baltimore trip, the Association pointed out that the grievant did not charge the State for the airfare for his daughters. He rented a car, a fact with which the State never had any apparent concern, to drive to the hotel from the airport. The vehicle was rented with unlimited mileage – meaning that the car cost the same whether they drove it 10 miles or 100 miles.

19. Moreover, pursuant to State regulations, the grievant and Mr. Bhagyam were entitled to separate hotel rooms yet they bunked together for several nights in order to save the State money. It was only after the grievant brought his daughters back from Pennsylvania that he got a separate room. He was entitled to do that and there is nothing contrary to the contract or State regulations in doing so. Moreover, he paid for the bulk of the fuel for the personal trips. He may have charged the State some $12.00 or so for the gas but this was a simple error and never evidenced an intent to defraud the State. The discrepancy in mileage on this trip is easily explained because the grievant picked Ms. Shen up and that added mileage. She did not claim mileage for this trip at all, which is thus consistent with the grievant's testimony.

20. Regarding the dinner in Baltimore that was the subject of considerable discussion, the grievant clearly indicated that he did not eat the banquet on September 1, 1998 due to illness and that he ate a dinner at another locale. At best this is an inadvertent mistake and may even have been entirely legitimate if he was not there. The State never proved there was any intent to claim expenses for the Baltimore trip that should not have been.

21. The Association pointed to the story about the trip to the cabin to pick up fishing gear as told by Mr. Bhagyam as simply made up. The grievant has not owned the cabin for more than 13 years and the story about getting the fishing gear never happened. This is another instance of these employee's lying to cover their own backsides and to impale the grievant with a lie.

22. The Association argued that the trips to LaCrosse were quite legitimate since DNR and USFWS were beginning new projects in 2003, which necessitated the grievant going there more often. This was verified by Mr. Nelson and other witnesses as well as the grievant. The State made much of a trip to deliver booties when in fact that was not the main purpose of the trip at all. The grievant's report of that day shows that he went there in May of 2005 to instruct the Crystal Springs hatchery personnel on vaccination procedures and simply delivered the booties as an adjunct to that.

23. The Association noted that the vast bulk of the State's case against the grievant is based on the unsupported allegation that he trumped up work related reasons to charge the State for visits to his girlfriend. The Association argued vehemently against this and noted that there were a multitude of purely personal trips to LaCrosse where the grievant did not charge the State at all.

24. The Association asserted that there is however nothing improper about charging mileage and expenses for a dual-purpose trip. For the trips that involved both work related reasons and personal ones, these expenses can be charged and the State does not dispute that. The State's claim is that some of the trips were purely personal and should not have been charged. The Association focused on those and argued that there was always a business purpose for any trip charged to the State.

25. Regarding mileage, the Association argued that there is no requirement that Map Quest or other mileage calculator be used. If the employee leaves the main road to get a meal or gas that mileage is chargeable. At best the inconsistencies show that at times the grievant would combine the trip mileage with "local mileage." The mileage charged was legitimately driven for work related purposes on the dates used as the basis for the charges here. The Association also pointed out that in many cases the mileage used to USFWS was the same well prior to 2002 as it was after that.

26. The Association argued that the most compelling evidence here is the fact that there was a change in the relationship between DNR and USFWS that roughly coincided with his relationship with the woman in LaCrosse that created quite legitimate reasons for the increase in frequency of the visits there. Moreover in 2002 the grievant was given two specific directives to change DNR lab operations to coincide with so-called QA/QC procedures and to start a program for lab certification through USDA. Both of these necessitated frequent visits to USFWS. The State simply chose to ignore this and assumed that the frequency of the trips were completely related to personal reasons by the grievant.

27. The Association provided some explanation for the timing of the trips to USFWS. Many of these trips coincided with holidays and weekends but the Association noted that the grievant had been requested to collaborate with USFWS employees and to come on Fridays since those were the best days to do that. The Association noted too that while these trips were virtually always dual-purpose trips the grievant was given that latitude by the very same supervisors who are now trying to fire him for exercising it. This seems duplicitous at best.

28. Finally, the Association and the grievant acknowledged that having Ms. Shen drive to LaCrosse to pick him up was an error in judgment and should not have happened. Despite this clear lapse in judgment, this should not provide the basis for termination of an employee with such an outstanding and long record of service to the State and to the scientific community.

29. The essence of the Association's case is that the grievant, while exhibiting poor judgment at times and lax record keeping in others, never had the intent to defraud the State or to intentionally misrepresent expenses or time. He is the victim of a scheming pair of subordinates who have worked tirelessly, to the exclusion of other work duties, to compile fabricated and trumped up charges against him. The grievant always had the intent to do what was right and to report his expenses and time accurately but simply is not as good at that sort of thing as perhaps he should be. His main role however is as a scientist and there is no question that he excels at that in every way.

The Association seeks an award reinstating the grievant with full back pay and accrued contractual benefits and the reduction of the discipline in this matter to a letter of expectations detailing how expenses are to be reported. The Association also requests an Order of the Arbitrator directing the State to provide the time and place of occurrences involved in any future discipline involving the grievant. Finally, the Association requests an order of the arbitrator providing that in any case where the State refuses to provide the information required by the contract between the parties and the information provided pursuant to the Order requested herein, that the subject employee may refuse to be questioned unless and until such information is provided as required without risk of insubordination.

MEMORANDUM AND DISCUSSION

The facts of this case were quite complex and hotly disputed. They also exhibit a working environment within the Pathology Lab that could at times best be described as pathological. It was not possible frankly to determine who started the working relationship off on this dangerous trail but it was clear that responsibility was jointly shared by all concerned. Suffice it to say that as a backdrop to the rest of the discussion of this matter it was clear that Ms. Shen and Mr. Bhagyam were disgruntled workers who had been complaining that they did all the work in the lab for the year prior to the events giving rise to the instant case. It is also clear that they voiced those concerns to Mr. Wright and others but that their complaints about the grievant were unfounded. It is also clear that the grievant's management style was very lax at times and that his record keeping was even more so. These things and many others were factors in this case. There is almost always more going on in the working relationship among people who have been working together for as long as these individuals have than can be expressed in even a 3-day long arbitration hearing and this was never more clearly evidenced than here. Many things appear to have contributed to why this soured so badly but, as the old adage goes, it takes two to tango.

Turning now to the facts of this case it is apparent that credibility and factual consistency is a major factor in the determination of what happened here. As the State's representative put it at the outset, the case is about credibility. There was more to it than that but indeed credibility of the witnesses was at the very heart of the case here.

The State raised many instances wherein it alleged that the grievant intentionally misstated expenses, mileage and/or time that resulted in overpayments and in some cases double payments for expenses.

BALTIMORE TRIP: The State cited a trip he took to Baltimore in 1998 to attend the 3rd Annual Aquatic Animal Health Symposium. The first allegation was that the grievant charged the State for a second hotel room so he and his daughters could stay together. The evidence showed that he had brought them with him in what was shown to be something of a last minute decision that necessitated that he bring them to relative's in Pennsylvania. He stayed with Mr. Bhagyam in one room for some of the nights but stayed with the daughters on at least one night in a separate room. The labor agreement does not appear to provide specifically that supervisors covered by the agreement can have separate rooms but there was testimony to this effect and no contravening testimony was given by the State to rebut this. On this record it appears thus that two employees are entitled to have separate rooms and that in fact the grievant was saving the State some money by bunking in with Mr. Bhagyam. There was no showing of additional cost to the State as the result of the separate hotel room.

The State also raised the issue of the rental car used on this trip. The evidence showed that the grievant took several trips to and from Pennsylvania and Baltimore to bring his daughters to their relatives' home there. The evidence on whether the State was charged anything additional was sparse and the receipt provided at State exhibit 14J and Union exhibit 24 is difficult if not impossible to read in order to decipher whether that was or was not the case. The testimony was that the rental car was rented with unlimited mileage and that no additional expenses for the miles driven were charged to the State however so that part of the claim against the grievant fails for lack of proof.

There was the question of the gas purchases of some $11.99. It was apparent that some of the gas was purchases in Pennsylvania and that was clearly in connection with the personal trips. On the other hand, the grievant would have had to purchase some gas even if there had been no personal trips at all simply for the trips to and from the BWI Airport to the conference. It was not clear how far that was or what those charges would have been and it is somewhat speculative to simply guess. However the question is whether on this record there was a clear showing of an intent to defraud the State for the gas money and there was not.

The next item of contention here was the claim for a dinner the grievant ate when the State alleged that he was to be at a banquet. Again there was considerable confusion on the record as to when the banquet was and the ate at first claimed it was on one date only to change that to a separate date on the second day of the hearing. See State exhibit 21. The grievant claimed that he did not eat the banquet meal as he was ill and ate later on and claimed that. The gas receipts show that he bought gas in Pennsylvania on September 1st on two occasions. The State exhibit shows the banquet on September 2nd. The State pointed out that the banquet cost was already covered in the registration of the conference so the State was billed for a meal the grievant did not eat and then charged for the meal he apparently did eat that same day. While this does not on this record indicate a clear intent to defraud it does show the beginning of a pattern of lax record keeping that apparently pervades the case right up until the end.

EXPENSE REPORTS: The State pointed to a litany of expense reports that it alleged showed intent to defraud the taxpayers by either incorrect reporting or even double counting of expenses.

State exhibits 14 (a) and (b) show that the grievant claimed expenses for printer supplies in the amount of $31.89 on an expense report dated 4-19-99. The receipt for that was attached to the report. On a report dated 6-22-99 he again claimed that same expense but this time submitted an affidavit indicating that the receipt had been lost or misplaced.

At the hearing the grievant claimed that he must have missed the $31.89 on the June expense report since it was on the lower part of the screen and that since he uses the same report form on the computer to submit these it was probably accidental. That however does not explain the affidavit he submitted indicating that the receipt was lost and that it had not been paid.

It was not unnoticed that this expense went back to 1999 and was also part of the audit done in 2005 here, as will be discussed more below. It was curious to say the least what happened here and this evidence comes close to showing an intent to claim double expenses intentionally. It was not clear when the expense was paid however or whether the second expense report was also paid or not. Whether it was or not however does not negate the fact that it was submitted and that at the very least, this is very poor record keeping and submission of expense reports by the grievant. As will be discussed more below, had there not been the 2005 audit which also apparently turned this up, with the admonition given then to simply be more careful, the result in this entire case might have been different.

The State claimed that in 2003 he claimed the same expenses twice again for a trip on 9-14-03. It was first submitted on an expense report dated 9-24-03. See State exhibit 14c. It was submitted again by report dated 10-13-03, only 3 weeks apart. The reports all contain a statement right above the signature line that reads: I declare under penalties of perjury that this claim is just and correct and that no part of it has been paid except with respect to those advance amounts shown and AUTHORIZE PAYROLL DEDUCTION OF ANY SUCH ADVANCES." (Capitalization in the original). The State of course points to this language as making it clear that the signature on the report certifies that the claimant is being untruthful about the claimed expenses.

This was also frankly troublesome since it again shows very lax record keeping on the grievant's part. However, it was not unnoticed that in both instances, the grievant's supervisors signed off on these reports. It was not clear either whether by the time of the second report the expenses claimed on the first expense report had been paid. Again, these should not have been claimed twice and if they were somebody should have noticed it – including the grievant.

The State pointed to Exhibit 14e for a trip to LaCrosse on New Year's Eve. The grievant could not provide any explanation for why he went there that day and the State argued that this is suspicious at best since it coincided with such a major holiday. The grievant claimed that he wanted to bring some treats down to the USFWS employees for all the hard work they had done with him that year. The State argued that such expenses would never have been authorized however. The grievant on the other hand argued that Mr. Wright did authorize it and simply told him to combine it with other expenses. No special expense form was ever submitted.

There was no clear evidence that the trip there was entirely personal. Neither was there any clear evidence to the contrary showing that there was no work related reason for him to go. This does appear suspicious frankly given the dates involved and the fact that the return trip was on January 2nd. Clearly this trip had a personal purpose to it but it cannot be said on this record that there was in fact no work related reason for him to go there at that time. What we are left with is supposition without hard evidence that the trip was purely personal. As will be discussed below, lab work continues despite holidays or other days off and there could well have been legitimate work related reasons to go there given the nature of the grievant's job and the other directives he was under at that time to get the lab certified and to work more closely with USFWS employees.

The State pointed to a similarly suspicious trip around Valentine's Day 2004. See State exhibit 14f. The grievant's time report shows that he left on Friday February 13th around 11:00 a.m. on that day. Mr. Bhagyam's calendar shows he left around 1:00 p.m. however. See State exhibit 17. Ms. Shen gave similar testimony. Based on this, the State asserted that the grievant had intentionally misstated his expenses that day since he claimed lunch for that date. If, as he later claimed, he simply wrote down when he intended to leave, i.e. around 11:00 but got tied up doing something else and did not actually leave until 1:00 then he should not have claimed a lunch. Either way, according to the State, the grievant misstated something here.

The Association pointed to the contract language at Article 18 section 5 that provides as follows: Lunch reimbursement may be claimed only if the supervisor is in travel status and is performing required work more than thirty five (35) miles from his/her temporary or permanent work station and the work assignment is over the normal noon meal period." The Association asserts that he was in route over the noon meal period and was therefore entitled to lunch for that time. There is no contractual definition of "normal noon meal period" in the contract and that this varies with work needs. If the grievant had in fact not been able to get lunch due to work needs but got it enroute to a work assignment then the lunch would have been appropriate. Moreover, as the Association argued in many instances here, the work did necessitate that the grievant go to USFWS late in the week and that it was not atypical that he go on a Friday to meet with them there.

On this record it cannot be said that this amounted to an intentional misstatement of expenses. Both Ms. Shen and Mr. Bhagyam gave testimony that the grievant left later than his calendar said he did and that, in Mr. Bhagyam's case, he wrote that down. As discussed in other places in this decision, it was frankly troubling too that these employees would snoop in the grievant's calendar and would take the time to note his comings and goings and write that down in a calendar rather than doing their work. On this record given the issues of credibility by all these witnesses it cannot be said based on a preponderance of the evidence when the grievant left that day.

The grievant gave plausible testimony as to why he would leave to go to USFWS as noted further herein. Further, since there is no specific time frames for what the "normal noon meal period" is and, given the nature of this work, that may well be appropriate. Finally the contract does not require documentation of these expenses unless specifically required by the department. Here no such specific request was ever made – another fact that did not escape attention here as will be discussed more fully below. On this record, it cannot be determined with certainty that exhibit 14f shows any intent to defraud or intentionally misstate expenses.

The State also pointed to Exhibit 14g wherein the grievant claimed 3 meals and yet only apparently worked 4 hours on 7-14-04. The grievant claimed that he worked more than that but reduced his time to reduce the comp. time he claimed when he was in Peterson Minnesota on an inspection. There was no evidence presented that he was not there and the version of this was plausible enough that it cannot be said that there was an intentional misrepresentation of the facts.

With regard to Exhibit 14h, the State noted that the times stated there are wrong and are inconsistent with the grievant's own calendar. Exhibit 14h, dated 9-27-04, shows the grievant leaving at 11:00 a.m. when the grievant's calendar for that day has an entry indicating that Mr. Bhagyam returned to the office at 1:00 p.m. He claimed lunch for that day as well even though he could not have left until at least 1:00 p.m. that day.

The analysis of this item is similar to that discussed above. Assuming the grievant left at 1:00 but was tied up with other things until then it cannot be said with certainty that the claimed lunch that day was outside of contractual or department parameters given the nature of the work there. On this record there was insufficient evidence of an intentional misstatement on this item.

The State pointed to a second entry on Exhibit 14h and argued that the grievant did not actually leave on September 24, 2004 until after 1:30. That would have put him in LaCrosse after the USFWS closed for the day since they close at 4:00 p.m. and it takes 3 hours to get there from St. Paul. He claimed mileage and meals for this trip. The State argued that there could not have been a business purpose for this since he left after 1:30.

That assumption of course is based on the strength of the assertion that he in fact left after 1:30 and that is entirely based on Mr. Bhagyam's testimony. Throughout this proceeding there were problems with the credibility of both the supervised employees. It was abundantly clear that they had a serious axe to grind with the grievant for various reasons, not the least of which was that he and the department gave them a letter of expectation regarding the reporting of their own expenses and that they both took considerable umbrage over that. The evidence showed that for years the lab did run very loosely and that the employees became very used to that laxness. When it changed they became upset and began what was quite obviously a set of actions designed to cover their own tracks and actions and were designed to find fault with the grievant's actions. The testimony of the witness alone does not carry the issue here.

However, on this specific item, the evidence shows the grievant's statement that he left at 11:00 a.m. that day and arrived around 1:15. There is no sign-in at USFWS so there is no way to accurately determine when he got there. Obviously something is amiss here. If he left at 11:00 as he said in his expense report he would have gotten to USFWS well after 1:15, especially if he had stopped for lunch. All that can be said definitively is that the arrival time must be wrong and that he must have gotten there later than he wrote down. That does not appear to have cost the State anything however. While the grievant's record keeping was flawed in some minor and some major ways, this does not establish an intent to defraud the State nor does it establish an intentional misrepresentation of facts. As discussed more below, he was admonished to be more careful and accurate in his reporting of matters on expense sheets and this could well have been one of the things the department was talking about.

MILEAGE CALCULATIONS: The State pointed to multiple instances where the mileage stated on the various expense sheets was inconsistent for the same trip on different dates. There were in fact multiple instances where this was so. As an example, the trip to USFWS from the St. Paul lab was generally about 352 miles round trip. The evidence showed that prior to the grievant's relationship with the girlfriend in LaCrosse that was the mileage he claimed and was paid for. Even afterward, many of the trips also showed that exact mileage. There were many trips that showed different mileage. The grievant indicated that he many times lumped the local mileage, i.e. mileage spent driving around to places in and around the Lacrosse area, with the main trip. He also indicated, although no one could be specific, that the difference in mileage was related to going off the highway for lunch or fuel, construction and driving to several fish hatcheries in the LaCrosse area and that this mileage was also simply consolidated. It was all work related and while the records should have these broken down as requested on the form, it was clear that this was done routinely without concern.

The State submitted this for the purpose of undercutting the grievant's credibility. To some extent this was successful and in other ways it was not. The grievant gave plausible testimony as to why there were variations in mileage, which were cogent and understandable. On the other hand, the fact that these were so inconsistent at times shows a lackadaisical attitude toward these important reports. Moreover, for the grievant to send out a letter of expectations to the employees under his supervision without at the same time living up to those same expectations could certainly explain the reasons for drawing their ire.

The question though is whether the variations in mileage arise to the level of intentional misrepresentation. On this record they do not. For one thing they are written down on the form for all to see, including his immediate supervisor who in turn signed off on the mileage. (Significantly, Mr. Wright testified that he never saw anything suspicious about the trips to LaCrosse and approved all these expenses.) Moreover, there were instances where expenses were actually reduced prior to payment yet the mileage was never seriously questioned by anyone.

The State pointed to several other trips it alleged were suspicious or where the grievant's explanation for why he went and for some of the various expenses do not square with other evidence in the matter. The State also pointed to inconsistencies between the grievant's testimony, which it alleged was diametrically opposed to other testimony in the matter. The grievant testified that he took a fish with an abnormality to the USFWS lab for testing since he was not able to take a digital picture of it and send it there. He claimed the DNR lab did not have a digital camera whereas Ms. Shen said they did and that the picture could easily have been e-mailed to the lab without the necessity of driving the whole way to LaCrosse to drop it off.

There was some cogency to the State's argument here depending on which person one believes. The fact that the State may have had a digital camera does not end the discussion however since a picture, according to the Association, may not have been adequate to show the lab the exact nature of the fish's condition. The question is thus not whether the lab had a digital camera, but rather whether the trip was necessary. While credibility was certainly an issue in this case where one person's word with some credibility issues is pitted against another's with similar credibility issues, the ultimate outcome of such a contest is difficult at best to make.

The State pointed to a trip around Thanksgiving in 2004 when the grievant alleged he had to drop off fish ovarian fluid at the Lanesboro and Peterson hatcheries, both of which are near LaCrosse, when in fact they typically sent it by courier. The State alleged that there was no business purpose for this trip and that it appeared suspicious that he would go there in a year when he did not have his children with him for Thanksgiving. The State argued that the grievant actually made one trip rather than two and that the additional mileage and expenses were fraudulently charged. The State relied primarily on the testimony of Mr. Bhagyam, whose calendar shows the grievant leaving on Wednesday, not Tuesday, and Mr. Stork, the supervisor at the Lanesboro hatchery, who testified that he thought it was unusual for the grievant to stop by to get ovarian fluid.

The Association argued that this was mere conjecture on the State's part and that there is no evidence to support this allegation other than the testimony of Mr. Bhagyam that he observed that the grievant left on Wednesday 11-24-04 and returned on Monday 11-29-04. The Association also argued that Mr. Stork did not actually know where the grievant was going on 11-29-04 and assumed he was on the way back to LaCrosse.

Mr. Stork acknowledged that he did not know where the grievant was going or where he had come from on 11-29-04 and was in fact assuming all of this. Moreover, in reviewing Mr. Bhagyam's calendar, State exhibit 17, it is somewhat suspect that he would have made only the entry about the grievant during the entire month there and it was about this very issue. There was no explanation for why he felt this was so significant in 2004 to have done this or why with all of the other matters going on in the office for which a calendar would be used, there were no entries for anything else. There was thus an element of secondary gain here as well as the equally valid suspicion that these calendars were created primarily for the purpose of the hearing.

While again the 2004 Thanksgiving trip was suspect, the record does not establish by a preponderance of the evidence that it was fraudulently claimed. The grievant's expense record shows two trips and this was approved by Mr. Hirsch.

To be fair, the State raised some very valid points here that go directly to the accuracy and thoroughness of the grievant's reporting of expenses for these trips. While many of the instances relied upon by the State for its case were not shown to be fraudulent they did evidence a lack of thoroughness in reporting. This issue will be dealt with in the remedy portion of this matter since the grievant does have a responsibility to ensure that he, as well as those he supervises, report expenses accurately and correctly and as importantly, that he provide adequate information to justify the need for the trip itself. That was not always done here and had he been specifically warned about this earlier the result here might very well have been different.

As will be discussed further herein however, he was warned about his expense reporting practices in June of 2005 and was not told anything other than to be more careful. The record then reveals that he was and the record further reveals that there were apparently no problems in his expenses after the audit and the oral admonition given to him by his supervisors.

THE LACROSSE TRIPS: Now we come to the main reason the grievant was terminated – the allegation that he fabricated reasons to go to the USFWS and to the LaCrosse area in order to see his girlfriend rather than for true work related reasons. The state's allegation on this was not based on the fact that he didn't go to the USFWS lab at all, or that he never showed up as he claimed he did at the other hatcheries and facilities for the trip in fact it was apparent that in all cases where he claimed a trip to a facility he did in fact go there. The essence of the State's claim is that these trips were a sham in many cases and that there was no legitimate work related reason for him to go there. Much of what he "delivered" could have been mailed or couriered there at far less expense.

As noted above, the State's claim is that many of the trips appear very suspect as they coincide with major holidays and weekends. The State also notes the increased frequency of the trips coinciding with the time the grievant started a relationship with a woman in the LaCrosse Wisconsin area. The obvious import is that he was creating sham reasons to go there in order to charge the State for trips to see his girlfriend. While a dual-purpose trip is permissible and those expenses can legitimately be charged, the State alleged that these were not at all legitimate and should never have been charged at all. Further, the Association did point out that the grievant took many trips to LaCrosse that were in fact purely personal and did not charge the State anything for those. While this is but one fact in a sea of many, it does support the claim that the trips claimed as work related were in fact to some degree work related and that trips that were not were never charged as such.

The Association claimed that the State ignored the fact that the grievant had been directed to get certification of the lab and that this necessitated more frequent contact with that lab. He had also been doing far more work with the USFWS employees on several fish related diseases and conditions that again required him to be there more often.

The State pointed to one anecdotal instance where the grievant showed up at a hatchery in Southeastern Minnesota with protective footwear for lab employees. These "booties" are to be worn over shoes to prevent contamination in the lab. They are relatively small and light and could easily have been mailed or sent by courtier if they were truly needed there. The grievant however gave a more plausible explanation of this in that he was really there to do an inspection and that he simply brought the booties along to save some time and perhaps even money since he was in the area anyway. He also testified that he liked to meet with the field personnel from time to time to answer questions or provide information and training to them about their work. While he would not have brought the booties personally if that were the only reason to go, he did indicate that bringing them was merely an adjunct to a greater purpose. This was shown to be true and the booties incident was shown to be work related.

As noted above, it was troublesome that many of these trips coincided with holidays and weekends. Still though Mr. Nelson of the USFWS gave credible testimony that the grievant was there often in the relevant time frame and that he was needed there. As noted herein, the record shows that the grievant was given specific directives to work more closely with the USFWS lab and employees in 2002 and 2003 and that he was also directed to gain certification of the DNR lab in St. Paul. That necessitated a much closer working relationship with the USFWS lab than in past years. Thus, the main argument made by the State – i.e. that the grievant simply fabricated the need for the trips to LaCrosse was not generally supported.

Moreover, there was in fact a greater need for him to make more frequent trips there in the relevant time frame. While Mr. Nelson at USFWS was not able to confirm the exact dates on which the grievant was there nor was he able to in all cases say what he was doing there since he was not personally the person with whom the grievant worked at USFWS, he was able to confirm that the grievant's presence was needed there more often and that he was there quite frequently.

THE HINCKLEY TRIP April 21, 2005: The State pointed to an instance where it claimed that the grievant lied about the need to take a State van home without permission for purely personal reasons and wrote down that the van was taken to Hinckley and then forged Mr. Bhagyam's signature to cover this.

The evidence did not at all support this story. A careful review of the signature's on the MUR report reveals that it is far more likely than not that Ms Shen in fact forged the grievant's name on the MUR. The Association pointed out that in all of the instances where Ms. Shen filled out this report the word "Hinckley" is misspelled. On the operative report, it is again misspelled in exactly the same way whereas when the grievant filled it out on that same report, it is correctly spelled.

Moreover, there was no direct evidence that the grievant took that van home that night. In fact if he had, in order to have a vehicle while his was in the shop, and he had driven back to work the next day he would have been in the same position – without a vehicle to go home. The only evidence upon which the allegation rests is Mr. Bhagyam's testimony that the van was parked in a different spot on the next day and that it was unusual for the grievant to be in early in the morning. It was also of some significance that the timing of this allegation coincides very closely with the letter of expectations given to the lab employees and the subsequent grievance about it and that tension was very high in the lab at that time. This coupled with the other salient facts about the actions of the lab employees at that time undercuts the credibility of this allegation. Without more actual direct evidence that the grievant took the van home that night there is simply insufficient evidentiary support for this allegation.

MS. SHEN'S TRIP TO PICK UP THE GRIEVANT – The State did show that the grievant asked Ms. Shen to drive to LaCrosse in April 2004 to pick him up. There was no dispute about this; the grievant admitted asking her to do this and that there was no truly work related purpose for that trip. He explained simply that he sold his personal vehicle while in LaCrosse and was without a ride to work in St. Paul. He then called Ms. Shen and had her do it. She claimed mileage for this and other expenses. See State exhibit 13. These were approved by the grievant himself.

The record shows that this was in no way related to work and that the grievant's actions here were unjustified. This was by far the most disturbing and troublesome allegation in this entire case. The grievant simply described this as stupid and a lack of good judgment. It was a bit more than that frankly and evidenced a disappointing attitude that treated the DNR as someone's personal playground in terms of expense reporting and the use of State owned equipment; to say nothing of the time expended by a State employee to run this personal errand. This also came as close to persuading the arbitrator to sustain the discharge as anything. It was only for the several reasons stated below and the fact that only a few of the allegations made by the State in this case were proven by a preponderance of the evidence. Had this occurred more than it did or if it had occurred after the grievant had been warned in June of 2005 the result would absolutely have been different and the grievant needs to know that as strongly as possible. This award should serve as a stern warning that actions of this nature are not to occur again.

As will be discussed below, as a condition of reinstatement he is to repay the State for all expenses related to this trip as set forth on State exhibit 13 as well as reimbursement of the State of Minnesota for the time spent by Ms Shen at her rate of pay in effect in April 2004.

CRITERIA FOR DISCIPLINE AND DISCHARGE: Arbitrators have for years used a series of "tests" to determine whether just cause exists for the imposition of discipline. Not all use them but most do and even if they don't they always provide a good roadmap to see if the employer has provided adequate proof of the existence of just and proper cause for employee discipline.

These tests were first articulated by Arbitrator Carroll Daugherty in *Grief Bros. Cooperage*, 42 LA 555, 558 (1964). See also, *Enterprise Wire Co.*, 46 LA 359 (Daugherty 1966). In these cases Professor Daugherty notes that a negative answer to any of these questions may well mean that there is insufficient cause for the discipline imposed. These tests are as follows:

1. Did the Company give to the employee forewarning or foreknowledge of the possible consequences of the employee's conduct?
2. Was the Company's rule or managerial order reasonably related to the orderly, efficient and safe operation of the Company's business?
3. Did the Company, before administering the discipline to the employee make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the Company's investigation fair and objective?
5. At the investigation, did the "judge" obtain substantial evidence of proof that the employee was guilty as charged?
6. Has the Company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the Company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Company?

The Association raised several issues with respect to these tests it argued were fatal flaws in the State's case. The first of these was the investigation itself. It argued that the State failed to contact the employees from USFWS and interview them in order to verify the need for the grievant to be there. The record shows that they did not do so and while they called Mr. Nelson on perhaps one occasion the State did not conduct an investigation to verify the number of times the grievant was there or to verify what he had told them about the need for him to be there more often. The Association argued that the investigation was not therefore fair and objective and that one cannot say that the result would have been the same or that they would even have fired him if they had known what the USFWS had to say.

The State countered and argued that they already had been told by the grievant himself that USFWS had no way to verify the number of trips or the specifics of what he did when he got there and to have called them would have been futile since it would not have garnered any additional relevant information. Moreover, to protect the grievant's reputation during the investigation they directed the investigator not to contact USFWS since it would have tipped them off that the grievant was under investigation and that would have sullied his reputation within the scientific community.

The Association's point is to some degree valid. While it is speculation as to what would have happened had the State talked to the USFWS employees it was curious at best why they would not have done so in order to know why the grievant was there more often or at least to verify that he was there. Obviously at the point at which the investigation started it was apparent that there was some question that the grievant was even at the USFWS as he reported or whether he simply completely fabricated the trips. As noted above, the record does show that he was there; the question was whether the trips were legitimate or not. The investigative process requires that relevant leads be followed and here the grievant was being terminated for allegedly not going to where he said he was going and for going there for invalid reasons. For the State to have directed the investigator not to talk to these people in order to "protect the grievant's reputation" was a bit striking. In fact the investigator did a very thorough and very competent job of interviewing material witnesses to the matter and there was no reason to believe she would not have done so with the USFWS employees either. Finally, while this failure was not completely fatal to the case, since there was enough evidence they did find to support at least the allegations of misconduct and that these probably would have been the basis for some discipline, it cannot be said that the discharge would have proceeded if they had been able to verify that the grievant was there for the purposes he claimed at USFWS. Arbitration it is said exists to protect the process and while some flaws in the process can be excused and even overlooked if there is sufficient other evidence in the case to support the actions, such a flaw cannot be completely ignored.

DOUBLE JEOPARDY: The Association also raised the question of double jeopardy and argued that since the grievant's expenses, indeed the lab's in general, had been audited in the late spring of 2005, the State cannot now go back and discharge the grievant for the same allegations. The State argued on the other hand that there is no true double jeopardy sine the grievant was not formally disciplined based on the audit report in 2005. He was simply admonished to be more careful in his expense reporting. Moreover, there were new allegations discovered after the 2005 audit that also provided the basis for the discharge.

The State's position has merit. This is not, strictly speaking, a situation involving double jeopardy. Elkouri discusses double jeopardy as follows:

> "Once discipline for a given offense is imposed and accepted, it cannot thereafter be increased, nor may another punishment be imposed, lest the employee be unfairly subjected to 'double jeopardy.' The same is true where the employee does not accept the original penalty. The double jeopardy doctrine also prohibits employers from attempting to impose multiple punishments for what is essentially a single act. The arbitral concept of 'double jeopardy' has been explained as follows:
>
> The key to this fundamental arbitral doctrine is not the Constitution but rather fundamental fairness, as guaranteed by the contractual requirement of 'just cause' for discipline. Thus when an employee has suffered a suspension for an offense it would be unfair to fire him before he has committed a second offense." Elkouri and Elkouri, *How Arbitration Works*, 6th ed. at page 980-981

Implicit in the notion of double jeopardy is the requirement that there be some form of discipline imposed for a given offense and that a second discipline is imposed later for the same offense. Elkouri distinguishes this from the situation where an employee is suspended pending an investigation and later fired. There the clear understanding is that the original discipline is not final but is "pending investigation." The question then is whether the original action is discipline and whether there is some sense that it was the final action taken based on certain alleged misconduct.

The grievant was not formally disciplined for the audit. There was merely an admonition given to the grievant to be more careful based on this audit but there was no evidence that this was intended or accepted as a disciplinary matter of any kind. Applying the strict definition of the double jeopardy concept, what occurred here does not preclude the employer from using the same evidence it had garnered in 2005 as the basis for some sort of discipline in 2006.

Moreover there were allegations discovered *after* the 2005 audit that also formed the basis of the discharge, not the least of which appears to be the trip to LaCrosse by Ms. Shen to pick the grievant up. It was not entirely clear why this had not been discovered until the 2005 audit but the evidence showed that this, the exact nature of this trip was not known until after that. The expense report appeared legitimate enough until the State discovered what it was really for. Thus there is no true double jeopardy here.

Having said that however, there is a very real issue as to notice; the first of Daugherty's 7 tests, and whether the audit and the actions based on it not only did not place the grievant on notice that he would be disciplined but also led him to believe that he would not be disciplined for these actions. The State audited the grievant's report, apparently had most of the information about what was reported, could have checked the mileage, the reason for the trips to LaCrosse, could have contacted the USFWS in 2005 but chose not to, and had access to the very same expense reports listed above showing the trips to Baltimore, the duplicated expense reports etc. Moreover they had this after the letters of expectations were served on the other lab employees. This record did not contain much about that audit but it was clear that it occurred and that it covered the same time frame and much of the same evidence as was involved in this matter. After all of that Mr. Wright sat the grievant down and told him simply to be more careful in the way he did expense reporting. While this does not rise to the level of double jeopardy, requiring that the evidence not be considered at all, it does give pause to anyone reviewing this situation regarding the message being sent to the grievant about this.

Elkouri notes that "some arbitrators apply the double jeopardy concept when management unduly delays the assignment or enforcement of discipline. One arbitrator did so on the grounds that "it is denial of procedural due process and just cause to hold a charge over an employee's head indefinitely and to revive it whenever substantiating evidence might eventually surface." Elkouri at page 981, citing *United International Investigative Services*, 114 LA 620, 626 (Maxwell). Here while it is clear that the strict concept of double jeopardy does not apply on these unique facts, it is of some considerable note that the audit was completed in June of 2005 and the conversation between the grievant and Mr. Wright also occurred at that time and the discharge was served in May of 2006 and then only after new allegations arose.

Several other facts bore heavily here. First, it was apparent that the grievant did "get the message." There is no evidence of any problematic expense reports made after June of 2005. There was certainly no further instances or allegations involving directing State employees to do personal errands or taking State vehicles for personal purposes. The frequency of the trips to LaCrosse appears to diminish as well partially due to the fact that the need for them diminished as well. Moreover, at no point was the grievant ever directed to get pre-approval for trips and continued to have the trust and latitude given to him before. In fact, significantly, Mr. Wright testified quite credibly that he never saw anything amiss with the frequency of the trips to LaCrosse and never saw a problem with them despite the constant reports from the lab employees about the grievant's actions. Ms. Pfannmuller also testified credibly that she did not believe that the grievant was ever intentionally misreporting his expenses and that given his nature he was simply not careful about how he did paperwork.

It was clear that the grievant is not strong in paperwork kinds of things and was even described as "a man of few words" and an "absent minded professor type" personality. However one views those terms it was apparent that the grievant was lax in his paperwork but that once given specific direction he was and is capable and willing to follow that.

Perhaps the most important of the Daugherty factors is the notion that an employee must be on notice of those actions that will result in discipline and discharge. On this record this was to some degree lacking. He was told that what he had done in the past was essentially "OK" and that he just needed to be more careful. A year later he was discharged for essentially those same actions without any additional allegations of misconduct taken between June of 2005 and May 24, 2006 to support that. It seems to this arbitrator that this is contrary to what Professor Daugherty had in mind.

Moreover, there was nothing the grievant did between June of 2005 and the termination letter, at least on this record, that would have placed him on notice that he was on a continuing path to destruction. While the State alleged that it discovered some additional things the grievant did prior to June of 2005 there was no evidence that the grievant knew that. At that time for all the grievant knew, the State did have all of the evidence pertaining to the Baltimore trip and the other matters the State alleged were newly discovered after June of 2005. The Association showed that the reasonable assumption based on the message that was sent to the grievant was that the State had audited his records, essentially passed on it and told the grievant that while there were some inaccuracies in those he simply needed to comply with proper reporting procedures in the future.

Second, contrary to the strong assertion that the grievant can no longer be trusted given his position and the nature of the discretion he has in his position, the evidence shows that he is quite capable of complying with the directions from his supervisors and in fact did so, even though he made some mistakes in the past. Obviously, if there had been evidence of further actions of the type and nature that had occurred after the June 2005 conversation between the grievant and his supervisors the result could have, and likely would have, been different.

PRIOR ARBITRATION DECISIONS: Both parties submitted prior awards, some between these same parties in support of their respective positions. The State cited *State of Minnesota and MMA* (State case # 00-88; Association file 99-8-3848, Grievant Brown) decided by Arbitrator Sharon Imes. The arbitrator sustained the discharge of an employee who was determined to have essentially gone into a computer system and given herself more leave time by altering the employment records while her supervisor was out on a medical leave.

The Association had argued that the case was largely circumstantial but that claim was rejected by the arbitrator largely based on the lack of evidence that any other employee could have or would have done this. The facts there showed that the only records altered were for the grievant and that it was apparent that the grievant engaged in the most blatant and intentional behavior to fraudulently alter her records to grant herself more leave time than she had. The discharge was sustained.

The State also cited *AFSCME Council 5 and State of Minnesota*, BMS 07-PA-0079 (Reynolds 2006). There the arbitrator sustained the discharge of an employee for loafing on the job and for using State vehicles to perform personal tasks and for conducting personal business and other personal affairs while on State time. The evidence in that matter showed that the employee was in fact doing as alleged. There was no dispute as to the facts as alleged and apparently no witnesses called by the Union in support of its position that the discharge should be overturned. There was further no allegation of flaws in the investigation nor any sense that the facts were incorrect. The arbitrator rejected the Union's claim that the State needed to give the grievant an opportunity to correct his behavior before discharging him and was persuaded that the grievant's position gave him considerable latitude with regard to his whereabouts and actions. The State needed to be able to trust him not to sleep on the job and to refrain from making repeated personal use of State phones and vehicles.

In both cases the discharges were sustained. The State argued by analogy that the grievant here should be discharged as well given the nature of the grievant's position which requires he be trustworthy. The State further argues that given his misconduct he cannot be trusted now.

The cases are distinguishable. First, as noted herein, there was considerable dispute about whether these errors were the result of intentional actions designed to defraud the State or whether they were lapses in judgment and recordkeeping. Second, several of the supervisors indicated that they were not convinced that the grievant's actions were intentional. Third, the State performed the audit of the grievant's reports and nothing was done based on it until almost a year later. Finally, there were flaws in the investigation not shown to be a part of these prior cases.

The Association cited other cases where the discipline was reduced even though the grievant's made serious mistakes and engaged in serious misconduct. In *MAPE and State of Minnesota*, State # 84-569, MAPE case # 84-8-387, (Gallagher 1984) the arbitrator reinstated the grievant even though he had been found to have submitted false reports for expenses and mileage. The arbitrator found there that the grievant used the wrong form and may have filled it out incorrectly but that there was no actual intent to defraud the State for a registration fee of some $40.00. There as here, the grievant filled out a form with the wrong numbers on it and later submitted an affidavit for certain expenses indicating that the receipt had been lost. The grievant in the MAPE matter was also accused of making multiple personal phone calls using a State provided phone and WATS line and for using a State owned vehicle for personal purposes. There were several trips involved and the arbitrator specifically found that "the grievant not only misused the car assigned to him, but he did so in direct contravention of an order not to, and he influenced another employee to participate in the violation." Slip op. at page 18. Based on this and the risk that the grievant could arrange State business to fulfill his personal needs, see slip op. at page 19, the arbitrator determined that some discipline was warranted. Based on the record in that matter, the grievant was reinstated but without back pay or benefits.

In *MAPE and State of Minnesota*, (Daly, 1991), the arbitrator again refused to order discharge where the grievant was found to have specifically and intentionally misstated mileage on expense report forms and was paid inappropriately. The arbitrator found that the grievant "knew the audits were inaccurate because I [the grievant] knew the addresses were not right." Slip op at page 2. In addition, the grievant made repeated stops to addresses that did not exist and yet submitted sworn expense reports indicating that the mileage and other expenses were accurate.

The arbitrator reinstated the grievant with a suspension largely due to psychological issues and the fact that the grievant there was suffering from depression that affected his judgment. Obviously no such facts were presented here. Obviously too, the arbitrator was not saying that such conduct is somehow acceptable but that there was not sufficient cause to discharge the grievant on the record presented in that case. Clearly, it is never acceptable to misrepresent expenses but the point is whether there exists sufficient cause on the record presented in any individual case to sustain discharge. There the arbitrator ruled that there was not.

In *MAPE and State of Minnesota*, (Bognanno 1992) the arbitrator reinstated a grievant without back pay where there was a finding the grievant engaged in outside employment without prior approval, submitted false expense reports and used a State vehicle for personal purposes. There as here, the grievant worked in a largely unsupervised position and was given a fair amount of discretion regarding his time. The arbitrator sustained a 3-day suspension for the use of the vehicle and for submitting false reports. It was of some interest to note that the initial discipline for that was only a 3-day suspension. The discharge was for failure to complete reports on time and for abuse of sick leave. The grievant was accused of engaging in outside employment and falsely reporting this as sick time.

The arbitrator determined that the grievant was using sick time to engage in outside employment but that there was a medical reason to do so and that he quit that job when directed to do so by the State. Despite that the arbitrator ruled that the grievant had abused sick leave but that on the facts presented before him there was insufficient cause to sustain a discharge based on that. The arbitrator specifically found that the grievant "is an employee that is willing to deceive this Employer. The grievant's repeated actions in October of 2000, to deceive the employer, indicate a basic flaw in the Grievant's responsibility to deal honestly with his employer." Despite these findings, which were on that record more egregious than those determined to have existed here, the arbitrator reinstated the grievant without back pay or benefits.

These cases are helpful but provide only a guide as to what to do here. This case presents something of a mixed bag and there were certainly facts that cut both ways. On the one hand, the submission of inaccurate reports showed a lack of judgment and a lack of good recordkeeping by the grievant. Moreover, for him to expect something more of the employees in his department and under his supervision than he expected of himself again shows a lack of judgment on his part. More significantly, the request to have an employee bring him home from LaCrosse Wisconsin and then have her charge the time and mileage and other expenses for this trip come as close to the edge as one can get here and frankly nearly cost the grievant his job. This was more than "stupid" as he put it but contributed to the culture within the lab regarding expense reporting.

Mitigating against this were the flaws in the investigation as noted above and the very real issue as to why the State would direct the investigator to do something less than a thorough job of investigating this by purposely not contacting the very people that could have provided valuable evidence one way or the other here. While some flaws in the investigation can be expected, as this is by no means an exact science, this was glaring.

Further, the fact that the grievant's expenses were audited less than a year prior to his discharge on this record was of some considerable concern. As noted, the grievant did not engage in further behavior after that time in this regard. The Association was thus able to show that the grievant is not somehow incorrigible or that he can never be trusted again as alleged. While the grievant was not as contrite or as outgoing as one would hope at the hearing, this was explained adequately by the description of his personality. It was apparent that the grievant is willing to make any necessary changes in his reporting of expenses and to comply with whatever verification requirements are placed on him by management and that he understands now the serious consequences of the failure to do so in the future.

Finally, as established by the arbitrations cited above, there appears to be a history of close examination by various arbitrators of discharge decisions made under very similar circumstances, some of which appeared to be even more egregious than those charged here, and to reinstate grievant's if the overall record supports that claim. In those instances where it was not it was due to the finding that the grievant's were in such a sensitive position or that there was such intentional actions as to warrant discharge.

REMEDY: Here the record does not support a discharge. The grievant is by all accounts a very competent scientist with a national reputation. His work product appears to be exemplary and is a valuable asset to the State and the scientific community of which the grievant is a part. Given his longstanding record, his outstanding performance and the evidence that he has changed his behavior to comply with the directives to be more accurate in his reporting of expenses etc. reinstatement to his former position is certainly appropriate.

The last of the Daugherty tests is indeed whether the punishment fits the proven offense. While it is never excusable to intentionally double charge an employer for expenses here there was a lack of proof that the charges were intentionally misrepresented. Moreover, while trust is always an issue, on this record there was an insufficient showing that the grievant is somehow an incorrigible employee or as arbitrator Bognanno put it, "an employee that is willing to deceive this Employer."

The remedy was left to the discretion of the arbitrator. Arbitrators must be cautious about overturning discipline lest they begin substituting their judgment for that of the employer. It is not appropriate to change the discipline meted out unless there is a rational basis for that. Here some of the allegations used as the basis for the discharge were not proven or not proven completely by the State. The grievant did not appear to be an untenable risk for re-offense and appears willing to "tow the mark," so to speak and comply with any requirements placed upon him for the reporting of expenses and mileage etc. For these reasons and for the reasons set forth above, reinstatement is appropriate even though the grievant made some mistakes here.

Having said that it is clear that some discipline is warranted for the lax record keeping, the double standard set as a supervisor and the actions in directing an employee to perform personal errands for him. These are serious issues and ones that cannot occur in the future if the grievant expects to keep his employment with the State of Minnesota. While the arbitrator does not have the authority or jurisdiction to impose a future remedy it should come as no surprise to anyone that offenses of this nature may well result in his termination if they happen again.

The question is thus on what basis should the grievant be reinstated. The Association urged that the grievant be reinstated with full back pay and benefits. This too would be inappropriate given the seriousness of the offenses the State did prove and would send the wrong message to the grievant and anyone watching the outcome of this case that one can simply send off expense reports like this without consequence. A suspension of shorter duration was also considered but rejected for that same reason.

The grievant is thus to be reinstated without back pay or other benefits. Reinstatement is to take place within 5 business days of this Award. In addition, since the State did show that some expenses were inappropriately charged and should not have been paid he is to reimburse the State for the expenses that were inappropriately paid as shown on State exhibit 13 as well as the time spent by Ms. Shen for the trip to LaCrosse and back to pick the grievant up, and for those expenses listed on State Exhibit 14 a, b, c, and d herein that were apparently double charged to the State.

Finally, there is the question of whether the Association's further requests for what amounted to an interpretation of the collective bargaining agreement can be granted. It would be outside of the jurisdiction granted this arbitrator to award the language or the remedy requested by the Association in its request for remedy here beyond the determination of the discipline and the remedy to be imposed here. The arbitrator's jurisdiction is set by the contract and the issue as stipulated by the parties. Based on that the Association's request for further relief or remedies are denied as outside the jurisdiction of the arbitrator to award.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant shall be reinstated to his former position but without back pay or accrued contractual benefits. Also, and as a condition of reinstatement, the grievant shall pay back to the State of Minnesota the amounts found to have been claimed incorrectly as noted above on State exhibits 13 and 14 (a), (b), (c), (d), for any amounts double billed/claimed. The remainder of the Association's request for orders is denied as outside of the arbitrator to award in this matter.

Dated: May 1, 2007

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Jeffrey W. Jacobs, arbitrator

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